

Because Havens has also requested that the court construe his motion in any way necessary to grant relief, and he appears to challenge the validity of his current

criminal conviction and sentence, I intend to address his motion as one to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

However, under *Castro v. United States*, 540 U.S. 375 (2003), courts must notify pro se litigants when they intend to recharacterize a pleading as a § 2255 motion and provide them the opportunity to withdraw the motion or amend it so that it contains all the § 2255 claims they believe they have. 540 U.S. at 383. Courts must also warn inmates of the consequences of recharacterizing their pleading as a § 2255 motion. *Id.*

First, a federal inmate who wishes to file a § 2255 motion must normally do so within one year of the date upon which the judgment becomes final. 28 U.S.C. § 2255(f). If the defendant does not appeal the trial court's judgment, the judgment generally becomes final fourteen days after entry of final judgment, when the defendant's opportunity to appeal expires. *See* Fed. R. App. P. 4(b). However, a litigant may also be able to demonstrate circumstances under which the court will calculate the one-year statute of limitations from a different date, such as the date upon which the litigant discovers new evidence or the date on which a new rule of law applicable to the case was recognized by the Supreme Court and made retroactively applicable to cases on collateral review. *See* 28 U.S.C. § 2255(f).

After review of Havens' motion, I note that it appears to be untimely, and it may be summarily dismissed as such if treated as a § 2255 motion. Havens claims

that he received ineffective assistance of counsel for a variety of reasons, but he does not identify any new evidence that would support his claim and allow the court to calculate the statute of limitations from a later date. Havens also relies on the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2552 (2015), to argue that his sentence is unconstitutional. However, even assuming that *Johnson* applies to Havens' sentence, his motion falls beyond the one-year statute of limitations for raising this argument.<sup>1</sup> Nonetheless, I will allow Havens the opportunity to withdraw the present motion or amend it to submit additional information to cure its untimeliness.

Second, once a litigant has filed one § 2255 motion, he or she must apply for certification from the United States Court of Appeals for the Fourth Circuit in order to file a second or subsequent § 2255 motion as to the same conviction or sentence. 28 U.S.C. § 2255(h). In light of this limitation on filing successive § 2255 motions, I advise Havens that if he elects to have the court address the present motion as a § 2255 motion, he should include any other claim that he believes causes his conviction or sentence to be invalid or unconstitutional. However, if he has additional grounds and fails to amend, such claims raised in a later § 2255 motion would be dismissed as successive unless he first received

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<sup>1</sup> I also note that in 2015, the Federal Public Defender was appointed for Havens in light of the *Johnson* case. Havens' present motion states that his appointed counsel reviewed his case and determined that *Johnson* does not apply to his sentence.

certification from the United States Court of Appeals for the Fourth Circuit to file a successive motion.

Rule 2(b) of the Rules Governing § 2255 Proceedings requires a motion to vacate under § 2255 to be signed under penalty of perjury and to substantially follow the standard form.

Accordingly, it is hereby **ORDERED** as follows:

1. The Motion to Appoint Counsel, ECF No. 305, is **DENIED** as to its request that the court appoint counsel; and

2. The Motion to Appoint Counsel, ECF No. 305, is **CONDITIONALLY FILED** as a § 2255 motion and Havens is hereby **DIRECTED** to submit to the court within 21 days from the date of entry of this Order either (a) an objection to the court's intention to address the Motion to Appoint Counsel as one arising under § 2255, or (b) a completed § 2255 motion form (ENCLOSED), signed under penalty of perjury, to have the court consider the claims under § 2255. Havens' failure to comply with this Order will result in the dismissal of the conditionally filed § 2255 action without prejudice.

ENTER: April 29, 2019

/s/ James P. Jones  
United States District Judge

**Motion to Vacate, Set Aside, or Correct a Sentence  
By a Person in Federal Custody  
(Motion under 28 U.S.C. § 2255)**

**Instructions**

1. To use this form, you must be a person who is or will be serving a sentence under a judgment against you in a *federal* court. By using this form, you are asking for relief from the conviction or the sentence because the sentence was imposed in violation of the Constitution or laws of the United States, the court was without jurisdiction to impose such sentence, the sentence was in excess of the maximum authorized by law, or the sentence is otherwise subject to collateral attack. 28 U.S.C. §2255(a).
2. You must file a § 2255 form in the United States district court that entered the judgment that you are challenging. In a § 2255 motion, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different judge or division (either in the same district or in a different district), you must file a separate motion in the federal court that entered that judgment.
3. To ensure that your claims are given full consideration, your responses on the form must be typed or neatly written in the space provided, on one side of the paper only, with one-inch margins on all sides of the text. Carbon copies are not acceptable. **Never** use tape on pleadings submitted to the Court. Your motion must be typed or **legibly handwritten** on the attached form.
4. Answer all the questions. You do not need to cite any law. You may submit additional pages if you need more space for your answers. You may also submit a separate memorandum explaining your claims. Be sure these separate documents comply with the format explained in Paragraph 3.
5. You must tell the truth and sign and date the § 2255 form under penalty of perjury. If you make a false statement of a material fact, you may be prosecuted for perjury. Please note that photocopied or carbon copy signatures are not acceptable.
6. You need only send the original petition to the court. If you want a file-stamped copy of the petition, you must enclose an additional copy of the petition and ask the court to file-stamp it and return it to you.
7. If you were sentenced in any division of the United States District Court for the Western District of Virginia, send your completed, original § 2255 form and any attachments to the Clerk's Office at the following address:

Clerk's Office, United States District Court  
for the Western District of Virginia  
210 Franklin Road, SW, Suite 540  
Roanoke VA 24011-2208

8. **CAUTION:** You must include in this motion all the grounds for relief from the conviction or sentence that you challenge, and you must state the facts that support each ground. If you fail to set forth all the grounds in this motion, you may be barred from presenting additional grounds at a later date.
9. **CAPITAL CASES:** If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.

<b>United States District Court</b>		District	Western District of Virginia
Name <i>(under which you were convicted)</i> : Charles Earnest Havens, Jr.		Docket or Case No.: 1:11-cr-00037-3	
Place of Confinement: FCI Williamsburg		Prisoner No.: 16321-084	
UNITED STATES OF AMERICA		Movant <i>(include name under which convicted)</i>  V. Charles Earnest Havens, Jr.	

1. (a) Name and location of court which entered the judgment of conviction you are challenging:

(b) Criminal docket or case number (if you know):

2. (a) Date of the judgment of conviction (if you know):

(b) Date of sentencing:

3. Length of sentence:

4. Nature of crime (all counts):

5. (a) What was your plea? (Check one)

(1) Not guilty ☐ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☐

8. Did you appeal from the judgment of conviction? Yes ☐ No ☐

9. If you did appeal, answer the following:

- (a) Name of court: \_\_\_\_\_
- (b) Docket or case number (if you know): \_\_\_\_\_
- (c) Result: \_\_\_\_\_
- (d) Date of result (if you know): \_\_\_\_\_
- (e) Citation to the case (if you know): \_\_\_\_\_
- (f) Grounds raised: \_\_\_\_\_

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(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☐

If "Yes," answer the following:

- (1) Docket or case number (if you know): \_\_\_\_\_
- (2) Result: \_\_\_\_\_
- (3) Date of result (if you know): \_\_\_\_\_
- (4) Citation to the case (if you know): \_\_\_\_\_
- (5) Grounds raised: \_\_\_\_\_

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☐ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court: \_\_\_\_\_
- (2) Docket or case number (if you know): \_\_\_\_\_
- (3) Date of filing (if you know): \_\_\_\_\_
- (4) Nature of the proceeding: \_\_\_\_\_
- (5) Grounds raised: \_\_\_\_\_

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(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: \_\_\_\_\_

(2) Docket of case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

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(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

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12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.



(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is “Yes,” state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is “Yes,” did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is “Yes,” state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court’s decision:

Result (attach a copy of the court’s opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is “No,” explain why you did not appeal or raise this issue:

**GROUND TWO:**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**(b) Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐

No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐

No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

### GROUND THREE: \_\_\_\_\_

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): \_\_\_\_\_

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**(b) Direct Appeal of Ground Three:**

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

- (2) If you did not raise this issue in your direct appeal, explain why:

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**(c) Post-Conviction Proceedings:**

- (1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

- (2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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- (3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

- (4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

- (5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

- (6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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(7) If your answer to Question (c)(4) or Question (c)(5) is “No,” explain why you did not appeal or raise this issue:

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**GROUND FOUR:**

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(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

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**(b) Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

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**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is “Yes,” state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court’s decision: \_\_\_\_\_

Result (attach a copy of the court’s opinion or order, if available): \_\_\_\_\_

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(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

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Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

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13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

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14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

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15. Give the name and address, if known, of each attorney who represented you in the following stages of the you are challenging:
- (a) At the preliminary hearing:
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- (b) At the arraignment and plea:
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- (c) At the trial:
- 
- (d) At sentencing:
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- (e) On appeal:
- 
- (f) In any post-conviction proceeding:
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- (g) On appeal from any ruling against you in a post-conviction proceeding:
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16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☐
17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☐
- (a) If so, give name and location of court that imposed the other sentence you will serve in the future:
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- (b) Give the date the other sentence was imposed: \_\_\_\_\_
- (c) Give the length of the other sentence: \_\_\_\_\_
- (d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐
18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.\*
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\* The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.



Therefore, movant asks that the Court grant the following relief:

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or any other relief to which movant may be entitled.

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Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on \_\_\_\_\_ .  
(month, date, year)

Executed (signed) on \_\_\_\_\_ (date)

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Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.